Supreme Court of the United States

OCTOBER TERM, 1903.

No. 139.

DAVID R. JULIAN, SHERIFF, ET AL., PETITIONERS,

vs.

THE CENTRAL TRUST COMPANY ET AL.

BRIEF FOR THE RESPONDENTS.

CHARLES PRICE,
Solicitor for Respondents.

WILLIAM A. HENDERSON,
F. H. BURBEE,
Of Counsel.

(18,685.)

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DAVID R. JULIAN, SHERIFF; MRS. CLEMYE JAMES, ADMINISTRATRIX OF W. A. JAMES, AND MRS. FANNIE E. HOWARD, ADMINISTRATRIX OF JOHN H. A. HOWARD, PETITIONERS,

vs.

THE CENTRAL TRUST COMPANY OF NEW YORK AND THE SOUTHERN RAILWAY COMPANY, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

In support of the decree of the circuit court of the United States for the western district of North Carolina, entered on the 19th day of December, 1901, to be found on printed pages of the record, 42 and 43; and duly affirmed by a decree, printed on page 207, entered in circuit court of appeals, May 10, 1902; and, in answer to the brief, of petitioners' counsel, we submit the following:

STATEMENT OF THE CASE.

There was a foreclosure suit, prosecuted in the circuit court of the United States, western district of North Carolina, the purpose of which was, to foreclose a second mortgage, executed by the *Western North Carolina* Railroad Company, to the Central Trust Company of New York, trustee, of the date of the 2d of September, 1884 (Record, p. 95).

There was a decree of foreclosure and sale, duly entered in said suit May 2, 1894, and filed in the office of the clerk, at Statesville, May 5, 1894.

This decree of foreclosure and sale so entered and filed, as aforesaid, in May, 1894, provides, amongst other things, as follows:

"The *purchaser or purchasers* of this property herein decreed to be sold," the Western North Carolina railroad and its franchises, "shall be invested with and shall hold, possess and enjoy the said mortgaged premises and property herein decreed to be sold, and all the rights, privileges and franchises, appertaining thereto, as fully and completely, as the Western North Carolina railroad *now holds and enjoys, or has heretofore held and enjoyed the same;* and further, the said purchaser or purchasers," and in this case, the Southern Railway Company, "shall have and be entitled to hold the *said railroad and property discharged of and from the lien of the mortgage foreclosed,* in this suit, and from the claims of the *parties to this suit or any of them,* except the first consolidated mortgage of September 1st, 1884" (Record, p. 108).

After this decree of sale, the property, that is to say, the Western North Carolina railroad and franchises, were sold in pursuance of the same, when the Southern Railway Company, a corporation originally created, in the State of Virginia, and doing business in the State of North Carolina, duly authorized to do so, became the purchaser. On the 22d day of August, 1894, there was a decree of confirma-

tion of sale, duly entered in the circuit court of the United States, which provides, among other things, as follows (Record, p. 124):

"It is further ordered and decreed that the special master is hereby authorized and directed, on the request of said purchaser, to sign, seal, execute, acknowledge and deliver a *proper deed of conveyance to the said* Southern Railway Company, conveying to it, all and singular, the railroad, equipment, property and *franchises* so as aforesaid, sold under the decree of this court, free from any and all equity of redemption of the said Western North Carolina Railroad Company, *or any one claiming by, under or through it, except the prior mortgages recited in such decree.* Upon the delivery of such conveyance by the special master the said *Southern Railway Company shall fully possess, and be invested with all of the estate, right, title and interest in, to and of such railroad, equipment, property and franchises so sold under the decree of this court as the absolute owner thereof, to have and hold the same to it and its successors and assigns forever.* In order to facilitate the recording thereof, four counterparts, of such deeds may be executed, acknowledged and delivered by the special master, all or any one or more of which may be recorded, and any one or more of such counterparts, when executed, acknowledged and delivered, shall severally or collectively be deemed to be an original, and for all intents and purposes constitute a single instrument.

"On August 31st, 1894, on exhibition of the deed executed and delivered by the special master herein ordered, the defendant company is authorized, directed and required forthwith to deliver over to the said Southern Railway Company the possession of all and singular the railroad and property described in and conveyed by such deed.

"It is also further ordered that by way of further assurance and confirmation of title to such Southern Railway Company of the property so by it purchased under the decree of this court, the said The Western North Carolina Railroad Company, by its proper officers and under its corporate seal, and the Central Trust Company of New York, trustee, shall, upon request of said Southern Railway Company, sign, seal, execute, acknowledge and deliver to said Southern Railway Company all proper deeds of conveyance, transfer, release and further assurance of all the railroad, property

and franchises so as aforesaid sold under the decree of this court and embraced in the deed of the special master, *so as fully and completely to transfer to and invest in the said Southern Railway Company the full, legal and equitable title to all such railroad, property and franchises sold or intended to be sold under the decree of this court.*"

In pursuance of the decree, so as aforesaid, duly entered, there was a deed executed and delivered by the special master, to the purchaser, The Southern Railway Company, complainant, on the 22d of August, 1894, conveying to the purchaser, the property, as follows:

"All and singular the railroad of the said Western North Carolina Railroad Company in the State of North Carolina, extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to Asheville, on or near the French Broad river, in Buncombe county; thence along the French Broad river to Paint Rock, in Madison county, and also from said Asheville westward to the Tennessee river at or near the mouth of the Nantahala river, and thence westward to Murphy, in Cherokee county; and all real estate now owned or acquired for the purposes of said railroad, including all station, depot or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools and implements whatsoever, now owned or acquired for the purposes or business of the said Western North Carolina Railroad Company in connection with the said railroad and all the franchises, rights, privileges, easements, income, earnings and profits of the said Western North Carolina Railroad Company, connected with, issuing from or relating to the said above-described railroad.

"*The foregoing properties, real, personal, choses in action and franchises*, being embraced in the lien of the second mortgage of the Western North Carolina Railroad Company executed September 2, 1884, *and being sold in foreclosure of the same.*

"A more full and particular description of the property intended to be conveyed by this instrument being contained *in said decree of the 5th of May, 1894*, to which reference is hereby made, *together with all the corporate estate, equity of redemption, rights, privileges, immunities and franchises of said Western North Carolina Railroad Company*, and all the tolls, fares, freights, rents, income, issues and profits of the said railroad, and all interests and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decree directed to be sold, at any time owned or acquired by, and now in the possession of, said Western North Carolina Railroad Company."

The said deed was duly registered in the register's office for Rowan county, on the 5th of November, 1894.

(For a full copy of said deed, see Record, page 154.)

The purchaser, the Southern Railway Company, under and by virtue of the said decrees of foreclosure and sale, and the deed so executed, and delivered, entered into and took possession of the railroad and property and franchise in August, 1894, and has been *in the possession of the same ever since, as sole, absolute and exclusive owner.*

This ownership, on the part of the Southern Railway Company, sole and absolute, is subject only to the lien of the first mortgage, the trustee in that mortgage, being the Central Trust Company of New York. The date of that mortgage is the 1st of September, 1884.

After the foreclosure and sale of the said property, the railroad and franchises, the Western North Carolina Railroad Company, corporation, *had no estate, no interest, in the railroad whatsoever; nor, in the franchises*, whatsoever.

The foreclosure suit was, in all respects, in due form, and orderly course of the court.

The decree so entered, as aforesaid, of foreclosure and sale, and of confirmation of sale, *in which the purchaser was adjudicated to be the sole owner of this property and franchises*,

adjudicated also, that ownership, to be free from all equity of redemption of the Western North Carolina Railroad Company, or any one, claiming by, under, or through it, except the prior mortgage.

It is to be noted that the corporation and stockholders were bound by these decrees. So are all persons or parties claiming by, under or through the stockholders, as are all those claiming by, under or through the corporation.

Since August, 1894, no person, no corporation, no company has had any estate in this property and franchises, sold as aforesaid, except the Southern Railway Company, a corporation created in the State of Virginia, and doing business in North Carolina.

Since August, 1894, this railway company has been in the undisputed, sole possession of the Western North Carolina railroad, as its owner, and has operated the same, under and by virtue of its ownership, absolute and unqualified, of the franchises, of the Western North Carolina Railroad Company, a corporation, created under the laws of North Carolina, which franchises, were purchased at the said foreclosure sale, with the other property, of the said corporation, all of which, is evidenced by the deed referred to, in this brief, and printed on pages 154, 155, &c., of the Record.

ARGUMENT.

It is not denied that the Western North Carolina Railroad Company had, under its charter and statutes of the State, the power to mortgage its franchise and other property.

To render this power effective, is carried with it, the power of foreclosure and sale.

This is expressly decided in the case of *New Orleans, &c., vs. Delamore*, 114 U. S. Reports, 501.

A mortgage, with no power to foreclose, *would be worthless and ineffective.*

This was the state of affairs in 1896, November, when James and Howard lost their lives, one, an engineer, and the other, a fireman, in the service of the Southern Railway Company. These men were killed on the line of this railroad *two years and three months after the foreclosure sale,* at a time when the Western North Carolina Railroad Company had no possible interest, no possible estate, in the Western North Carolina railroad, and none in the franchises of the corporation, both of which had been *sold, and bought by the complainant in August, 1894.*

These men, *James and Howard, were not in the employment of the Western North Carolina Railroad Company: and never had been in its employment.*

The power to employ servants had been sold, together with its other powers and franchises, and bought by the Southern Railway Company, more than two years before the deaths of these men. At that time the Western North Carolina Railroad Company, had no power to do anything, but exist as a corporation. It had no power to operate a railroad; no power of eminent domain; no power to employ servants or officers. *All of these powers* had been mortgaged, had been foreclosed, had been sold, under decrees of the circuit court of the United States. They were all purchased by the Southern Railway Company. *Two decrees of the circuit court in May and August, 1894, solemnly adjudicated, that these powers, franchises and railroad, real and personal property, were the property of the Southern Railway Company.*

These decrees, one of foreclosure, and the other, of confirmation of sale, were duly entered in the circuit court of the United States, *three years before any adjudication was had in any State court,* in the James and Howard cases, as they are styled. When these actions were begun in the State court, the superior court of Rowan county, North Carolina, against the Western North Carolina Railroad Company, to recover damages from that company, for alleged negligence

of the company operating the railroad, *these decrees had long since been entered*, in the circuit court.

As appears from the exhibits in the record, the rights of these parties to have satisfaction of their judgments obtained against the Western North Carolina Railroad Company, James and Howard, are based upon the charge of fraud in obtaining these decrees, in the foreclosure proceedings (Record, pp. 77–78, &c.).

It cannot be shown anywhere, *that the Southern Railway Company ever pretended to take possession of this property, and franchises under any lease.*

Its title to the same, rests upon decrees of the circuit court of the United States. That being so, it seems to us, that the liability of the lessor, for the tort of its lessee, has nothing to do with this case.

It is true the lessor, in a case of the kind mentioned by the counsel for defendants, has been held in a number of cases liable for the negligence of the lessee in North Carolina; but these decisions are all contrary to those of the United States courts, and, indeed, of all the other States. It is a matter of general law, and this court is not bound by such decisions, if they were involved in this case (*Baltimore & Ohio R. R. Co. vs. Baugh*, 149 U. S. Rep., 378; *Arrowsmith vs. Nashville &c. R. Co.*, 57 Fed. Rep., 165). In this case all the cases are reviewed by Judge Lurton.

It is contended, in the brief of counsel for defendants, that the decree, and opinion of this court, in former case, is *res adjudicata*. That was a supplemental bill filed to restrain and enjoin the prosecution of the suit of Pearson and others, *stockholders*, with whom these same parties joined to set aside the decree of foreclosure and sale and confirmation of sale, on the ground of fraud.

It was decided, Judge Morris delivering the opinion, that the complainants *were entitled to the relief demanded in the bill;* and, to that extent, the decree of Judge Simonton, on the circuit, was affirmed.

In the opinion of Judge Morris, there was a direction that the decree appealed from, be modified, so as to embrace no more *than was prayed for in the bill, that is to say, that the further prosecution of that suit be enjoined.*

In the decree entered on the circuit, in pursuance of the mandate, there were recited certain things not enjoined, one being, that Mrs. James and Mrs. Howard were not enjoined from bringing any other suit, as they might be advised (98 Fed. Rep., 495).

The opinion of the court, however, *was direct that any suit,* based upon the supposed rights of the stockholders, be, and is, enjoined. This was because the stockholders were represented in the foreclosure suit. They had had their day in court.

It is the same, as to the defendant corporation. *The Company, The Western North Carolina Railroad Company,* had had its day in court. Of course, the company was estopped, also, and as the *stockholders* were, and *all persons claiming under them,* so was the *corporation, defendant,* and all *persons claiming under, by, or through it.*

How do these parties claim? Their claims, their judgments, originated, *in something the corporation is alleged to have done, two years, and more, after the decree of the circuit court adjudicated the Southern Railway Company, to be the absolute owner of the railroad and franchises, sold under the foreclosure proceeding, in fee forever.*

So these parties do claim under and by reason of *the acts of the corporation,* and the purpose of the defendant, Julian, as disclosed in his advertisement of sale, is in *defiance of the decrees* of the circuit court, affirmed by circuit court of appeals.

The executions under which the sheriff was acting were as follows:

"STATE OF NORTH CAROLINA,
"*Rowan County.*

"IN THE SUPERIOR COURT.

"*To the sheriff of Rowan county, Greeting*:

"Whereas judgment was rendered on the 21st day of February, 1898, in the superior court of Rowan county in an action between Clemye James, admrx. of W. A. James, plaintiff, and The Western North Carolina Railroad Company, defendant, in favor of the said Clemye James, admrx. of W. A. James, against the said defendant, The Western North Carolina Railroad Company, for the sum of $15,000 and costs, as appears to us by the judgment roll filed in the office of the clerk of the said county of Rowan; and, whereas, the judgment was docketed in the said county of Rowan on the 21st day of February, 1898, and the sum of $15,000 is due thereon, with interest on the said $15,000 from the 3rd day of May, 1897, until paid, and the further sum of $161.65 for costs and disbursements expended in the said suit whereof the said defendant, The Western North Carolina Railroad Company, is liable.

"You are therefore commanded, as often before, to satisfy the said judgment out of the personal property of the said *defendant within your county;* or, if sufficient personal property cannot be found, then out of the real property of the defendant, and out of the corporate property, real and personal, of the said defendant, including its corporate franchises, corporate rights, privileges, powers, immunities, and all of the appurtenances belonging, or in anywise connected with or appertaining to it as a body corporate, *as owned and held by it on the day when the said judgment was so docketed in the said county of Rowan, or at any time thereafter, in whose hands soever the same may be;* and have you this execution, together with the money, before our said court at the courthouse in Salisbury on the 11th Monday after the first Monday in September, 1901, it being the 18th day of November, 1901, then and there to render the same to the said plaintiff.

"Witness W. G. Watson, clerk of our said court, at office in Salisbury, on the first Monday in September, 1901.

"Issued this the 3rd day of September, 1901.

"W. G. WATSON,
"*Clerk Superior Court.*"

"STATE OF NORTH CAROLINA, }
"*Rowan County.* }

"IN THE SUPERIOR COURT.

"*To the sheriff of Rowan county, Greeting:*

"Whereas, judgment was rendered on the 21st day of February, 1898, in the superior court of Rowan county in an action between Fannie E. Howard, adm'x of Jno. H. A. Howard, and The Western North Carolina Railroad Company, defendant, in favor of the said Fannie E. Howard, adm'x of Jno. H. A. Howard, against the said defendant, The Western North Carolina Railroad Company for the sum of $5,000 and costs, as appears to us by the judgment-roll filed in the office of the clerk of the said county of Rowan; and, whereas, the judgment was docketed in the said county of Rowan on the 21st day of February, 1898, and the sum of $5,000 is due thereon, with interest on the said $5,000 from the 21st day of February, 1898, until paid and the further sum of $140.13 for costs and disbursements expended in the said suit whereof the said defendant, The Western North Carolina Railroad Company is liable:

"You are therefore commanded, as often before, to satisfy the said judgment out of the personal property of the said *defendant within your county;* or if sufficient personal property cannot be found, then out of the real property of the defendant and out of the corporate property, real and personal of the said defendant, including its corporate franchises, corporate rights, privileges, powers, immunities and all its appurtenances belonging or in anywise connected with or appertaining to it as a body corporate *as owned and held by it on the day when the said judgment was so docketed in the said county of Rowan, or at any time thereafter, in whose hands soever the same may be;* and have you this execution, together with the money, before our said court at the courthouse in Salisbury on the 11th Monday after the first Monday in September, 1901, it being the 18th day of November, 1901, then and there to render the same to the said plaintiff.

"Witness W. G. Watson, clerk of our said court at office in Salisbury, the first Monday in September, 1901.

"Issued this the 3rd day of September, 1901.

"W. G. WATSON,
"*Clerk Superior Court.*"

The foregoing executions were *levied on the corporate property and real estate of the said Western North Carolina Railroad*, including corporate rights, franchises, privileges, powers, immunities, &c., on the 3d of September, 1901.

The following is the notice of sale published by the sheriff:

"SALE OF THE WESTERN NORTH CAROLINA RAILROAD UNDER EXECUTION.

"By virtue of executions issuing from the superior court of Rowan county, North Carolina, one in favor of Clemye James, admrx. of W. A. James, for $15,000.00, interest and costs, and the other in favor of Fannie E. Howard, adm'x of Jno. H. A. Howard, for $5,000.00, interest and costs, upon judgments duly docketed in the superior court of said county of Rowan, reference hereby being had to the said judgments for a fuller description thereof, and by virtue of the levy made thereunder, the undersigned, as sheriff of Rowan county, State of North Carolina, *will sell agreeably to the laws of the State in this behalf provided*, at public auction to the highest bidder, at the court-house door in Salisbury, on Monday, the 7th day of October, A. D. 1901, at the hour of 12 m., all and singular *the corporate property of the defendant, The Western North Carolina Railroad, existing in the State of North Carolina*, including *its corporate franchises, rights, privileges, immunities, easements and appurtenances of every kind appertaining*, belonging to, or in anywise, connected therewith, *or issuing out of and relating to the said The Western North Carolina Railroad*, together with all *of its property in the State of North Carolina*, and *including its road-bed and right of way, its real estate acquired and owned for railroad purposes, its stations, depots, grounds, its railway tracks, switches, sidings, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger, freight and other houses, machine shops, buildings and fixtures—the said railroad extending from the town of Salisbury through Statesville, Newton, Hickory, Morganton, Marion, Asheville to Paint Rock in Madison county, and from Asheville westward by way of Waynesville to Murphy in Cherokee county*—reference being had for a further description of *said road and its property, rights and franchises to the*

charter of the said road and the amendments thereto enacted from time to time by the General Assembly of North Carolina.

"This, the 4th day of Sept., 1901.

"D. R. JULIAN,
"*Sheriff of Rowan County.*"

It is to be observed that the sheriff in the above notice of sale says he "*will sell agreeably to the laws of the State, in this behalf provided,*" the property and franchises levied on.

The following is the statute, under which he proposed to sell "*agreeably to the laws of the State:*"

Sec. 674 of the Code of North Carolina:

"The officers making sale shall by deed convey to the purchaser all the immunities and privileges which by law belong to the corporation, so far as relates to the right of demanding fare and toll; *and the officer shall immediately after such sale, deliver to the purchaser possession of all the corporate real property connected with the franchise, belonging to such corporations, in whatever county the same may be situated,* and the purchaser may thereupon demand and receive to his own use all the fare and toll which may accrue within the time limited by the term of his purchase, in the same manner and under the same regulations as such corporation was before authorized to demand and receive."

The sheriff in the execution was directed to satisfy the same, one in the sum of $15,000, and the other in the sum of $5,000, by sale of property "*as owned and held by it,*" the corporation, the Western North Carolina Railroad Company, "on the day when the said judgments were docketed in said county of Rowan."

The judgments were docketed in February, 1898, *years after the decree, and years after the registration of the deed of conveyance to the Southern Railway Company,* made and executed by order of the circuit court.

At the time of the docketing of the said judgments, the Western North Carolina Railroad Company owned no property, in so far, as appears here. Certainly it had no interest

or estate in this property, the Western North Carolina railroad, nor in the franchises purchased by the Southern Railway Company, in August, 1894.

It is insisted that the supreme court of North Carolina adjudicated in the case of *James vs. W. N. C. R. R. Co.*, that this property was liable for these judgments (121 N. C. Rep. 528).

Nothing was adjudicated in that case except the matter, the question before the court, which was whether the old corporation *was dissolved under section 697 of the Code of North Carolina, by the sale and conveyance in accordance with the terms of the mortgage.*

The court decided, the old corporation was not dissolved. We say, this was the question before the court. (See Judge Simonton's opinion, page 30, Fed. Reporter vol. 89.)

This was in September, 1897, in a case prosecuted against the Western North Carolina Railroad Company, by Mrs. James, adm'x, for the death of James, dec'd, and intestate.

The case was tried in the county of Rowan, and there was a judgment for the defendant, which judgment was reversed by the supreme court on appeal, at the September term of the court for the year 1897. It is alleged in the reply of the plaintiff, copy of which is set out in the bill on pages 71–72, &c., that this sale, by orders and decrees of the circuit court, and in accordance with its decrees, *was only a pretended sale,* and that the Southern Railway Company *had no title to the railroad or its franchises.*

The only question, however, *decided* in the case, *was*, as before said, whether there was a dissolution of the corporation.

Yet this court is asked to decree that the former decrees of the circuit court, entered in 1894, more than two *years before the deaths of James and Howard are nullities; and, that the Southern Railway Company is not the owner of the property and franchise conveyed to it by the circuit court.* In *two decrees,* entered in *1894, in the circuit court,* the Southern Railway

Company *was adjudicated to be the absolute owner of this property.*

In the next place, there are no lien laws in North Carolina which make judgments in favor of parties against a railroad company, liens upon property owned by other parties, whether corporations or not, purchased under foreclosure proceedings, *before the events out of which the judgments were obtained,* transpired.

When the causes of action originated, in 1896, November 18, the Southern Railway Company had been in possession of this property and franchise as purchaser for more than two years.

Under the law providing for sale of the property levied on by the sheriff, he was *compelled* to deliver possession of the same to the purchaser, *immediately* after sale.

This would be *irreparable damage, and to cast a cloud upon complainant's title.*

This relief asked is not in violation of section 720, of the Revised Statutes.

It is to arrest the hand of this officer, in attempting to seize the property of complainant, illegally.

This officer is not the agent of these plaintiffs in the executions copied in the bill. He was directed what to do; and, what not to do. *If he could find property, belonging to the defendant in the execution, he was bound to seize it;* but the property he proposed to seize, was not "*owned by the defendant in 1898.*" There was a deed, duly registered, showing that it was the property of the Southern Railway Company. It was, at least, a *presumption,* that it was so owned, and there was a way, pointed out by the law, by which this title could have been tested. His proposition to *seize it, and deliver it to the plaintiffs in the execution, or purchasers,* was not in pursuance of his agency for the plaintiffs. It was a trespass, threatened, and one the court will enjoin in protection of its purchaser. (See Judge Simonton's opinion in 89 Fed. Rep., page 24; also, opinion of Judge Boyd, in the record, page 35.)

In so far as the standing of these *parties in court is concerned*, they are as much bound by the decrees of the circuit court, as the stockholders; or, the corporation. Whatever rights they have, came to them, through acts of the corporation. And, as the *corporation* is estopped, so are *these parties claiming by, under, and through it.*

The bill filed, praying for the injunction, may be a supplemental bill. If, however, treated as an original bill, it is ancillary, in its character, and, in aid of the original bill. It grows out of, and is dependent upon, the original bill. (Clark *vs.* Matthewson, 12 Peters' R., 120; Foster's Fed. Practice, 28-29, cited by Judge Simonton on page 28, 89 Fed. Rep., on the circuit, in a former case.)

This bill was filed after the decree of confirmation of sale, already referred to in this brief. It was to enjoin the sheriff, David R. Julian, *from seizing, and delivering into the hands of the purchaser, the Western North Carolina Railroad, and the franchises of the corporation*, under a proposed sale, to satisfy the two executions, already referred to, one for $15,000 in favor of Mrs. James, adm'x and the other, $5,000, in favor of Mrs. Howard, adm'x.

It was suggested, and is now, that this is too late, being after the decree.

As is shown by the extracts from the executions, the notices of sale, and the statute under which the sheriff was acting,—section 674 of the Code of North Carolina,—the whole proceeding was in defiance and contempt of the decrees of the court, entered in the foreclosure proceedings, in 1894, all set out in full, in the record.

Section 674, which is set out in full, in this brief, on a former page, provides, that the officer shall "immediately after such sale deliver to the purchaser, possession of all the corporate real property, connected with the franchises," etc. This is the law the sheriff referred to, when he said, in his notice, he would "sell agreeably to law."

As to the jurisdiction, we refer to the case of Root *vs.* Woolworth, 150 U. S. Rep., 401. It was held in that case, the late Justice Jackson delivering the opinion, to be ancillary to the original proceedings, and supplementary to the decree rendered therein.

It was an assertion of a right to carry into effect its own orders and decrees, by the court.

The following is quoted from the opinion by Circuit Judge Simonton, in his opinion already cited, 89 Fed. Rep.:

"The title held by the mortgagor passes, under the decree, to the purchaser, upon the consummation of the sale by the master's, or sheriff's, deed. As against all parties to the suit, the title is gone, and as the right to the possession, as against them, follows the title, it would be a useless and vexatious course to require the purchaser to obtain such possession by another suit. Such is not the course of procedure adopted by a court of equity."

This itself is a quotation from Justice Jackson, in 150 U. S., 401.

Further, says Justice Jackson, in this same case, 150 U. S. Rep., 401:

"The bill being ancillary to the original proceeding, * * * and supplementary to the decree, rendered therein, can be maintained without reference to the citizenship, or residence, of the parties" (page 413).

This whole subject is discussed in Root *vs.* Woolworth, *ibid.*, and it is conclusively shown there, by the justice, that the course pursued here, is the proper one.

The attention of the court is respectfully called to the opinion of Circuit Judge Simonton, 89 Fed. Rep., 24, upon the jurisdiction in this same case, the first time it came before the court in 1898. It shows upon its face what careful consideration the circuit judge gave to the facts of the case accurately stated, as they are.

So that the injunction was issued upon the bill, supplemental, to the original bill, to foreclose a mortgage, executed to the Central Trust Company, of New York, printed in the record, as before said.

As we say, this is a supplemental bill, or may be treated as an original bill, to remove a cloud from the title, cast upon property, bought by Southern Railway Company, at foreclosure sale, by decree of a circuit court.

It is also a bill, to protect the Southern Railway Company, in the enjoyment of property, bought, under a decree of foreclosure, and sale.

It is only in equity, that adequate relief can be had, in this proceeding; because, first, irreparable damage would be done, unless the officer was restrained from "*seizure of the property*" as he is *required* by the Code of North Carolina, to do. (See section 674, of the Code of North Carolina.) This section provides, that the officer shall, "*immediately* after such sale, deliver to the purchaser possession *of all the corporate real property connected with the franchise*," &c. (See notice of sale, printed in the bill, where respondent says, he will "sell agreeably to law," this property.)

Equity jurisdiction, also, is invoked in this case, to prevent a multiplicity of suits. There are other judgments against this old company, similar to these of James and Howard, and others. And, also, other actions, pending in this district against the Western North Carolina Railroad Company. (See transcripts; *Wehrman vs. Conklin*, 155 U. S. R., 314; pages 17, &c., of Record.) In *Central Trust Company, of New York, vs. W. N. C. R. R. Co.*, 89 Fed. Reporter, page 24, Judge Simonton shows that section 720, of Revised Statutes is not involved, nor violated.

On page 124 of the printed Record, as a part of the decree of confirmation of sale, is the following: "It is further ordered and decreed," that the special master make a deed to Southern Railway Company, conveying this "*railroad* and *property, franchise*, etc.," "*free from any and all equity of*

redemption, of the said Western N. C. R. R. Co., or, any one, claiming, by, under, or through it," except the prior mortgage, recited in the decree. This makes the Southern Railway Co. "*the absolute owner thereof.*" The owner of what? "*All and singular the railroad, equipment, property, and franchises, so, as aforesaid, sold* under the decree of this court." It is a sale and transfer of the *railroad and franchise;* not the *estate* of the Western N. C. R. R. Co., alone, but "the *property* and *franchises,*" themselves.

In the last paragraph of the same, there is a *further assurance*, proviso.

So that two years, before James and Howard were killed, under these decrees, deed, &c., the Southern Railway Co., was the "absolute owner" of the property and franchises.

The W. N. C. R. R. Co., had no possible interest or estate, in the *railroad*, or *franchises*, so sold.

There is no lien law in North Carolina, that gave Mrs. James, and Mrs. Howard, a lien upon a thing, the defendant, The W. N. C. R. R. Co., *did not have, at the time of the origin of their claims, the deaths of deceased.*

Then we see, they are cut off, because the decree says: "*Free from all and every equity of redemption* of the said W. N. C. R. R. Co., "*or any one claiming by, under, or through, it.*"

These people certainly claim "*by, under, and through*, the W. N. C. R. R. Co.," *because their judgments were obtained on account of something done, by the Western N. C. R. R. Co., as alleged, more than two years after the sale, under foreclosure.*"

Then, this is as much foreclosed, as the rights of stockholders. "The judgment of foreclosure is conclusive, against the stockholders," *and against anything, that the W. N. C. R. R. Co. could do, or, any right claimed, by any one, on account of anything, done by the W. N. C. R. R. Co. after sale.* (See Judge Simonton's opinion, page 29 Fed. Rep., vol. 89.)

See *deed of master*, as to *what was conveyed under these decrees, &c.* (page 154, Record).

In addition to authorities cited by Judge Simonton, see *Farmers' Loan & Trust Co. vs. Lake St. R. R. Co.*, page 51, 177 U. S. R., and, especially, pages 61 and 62.

It is well settled, that, for a sheriff to make, an "*excessive levy*" is actionable, by a defendant, in the execution (sec. 773, Mecham on Public Officers). "*It cannot be tolerated,*" says, Cooley, justice, "*that such a seizure shall go unrebuked*" (*Handy vs. Clifford*, 50 Mich., 355).

Here was *five millions of property levied on, and notice of purpose to seize "the entire property, corporate real," and deliver to the purchaser immediately after sale.*

A court of equity, is the only court, that *can* give adequate relief, in a case of this kind.

In this argument, we beg the *court to note the most important fact*, that the Southern Railway Company, a Virginia corporation, *purchased* the *Western North Carolina railroad, and franchises of the corporation*, and all of its other property, at a foreclosure sale, under a second mortgage, subject to a lien of the first mortgage, the Central Trust Company of New York, *being trustee in both mortgages.* This purchase was in fee.

This sale was duly confirmed, on the 22d day of August, 1894 (page 123, Record).

Under this decree, and by virtue of the deed, of the master, it is to be observed, the Southern Railway Company, became the absolute owner of the property, and franchises, of the corporation, sold; and, was in *sole possession* of the railroad, and franchises of the old company, and had been operating *the road for over two years, as sole owners, before the disaster*, out of which, resulted the death of James, the intestate of the respondent, James, admx.; and, of Howard, also.

The Western North Carolina Railroad Company, the old corporation, *at that time, had no interest, no estate of any kind or character, in the franchise;* or, *any other property of that old corporation*, which had been sold, and purchased, by the Southern Railway Company.

In the action brought by the admx. in the superior court of Rowan county, the State court, that is to say the James case, the *Southern Railway Company, was not a party.* The action was tried with James, admx., as sole plaintiff, and The Western North Carolina Railroad Company, *sole* defendant; same, as to Howard.

The contention on the part of the plaintiff, was, that the railroad was being operated by a lessee, under a valid lease, *made by authority of law*, and, that the lessor, that is to say, the Western North Carolina Railroad Company, was liable to plaintiff for the death of intestate, an engineer, the same caused by the negligence of the lessee, which lessee was in sole possession of, and solely operating, the railroad.

The contention of the defendant, that is to say, The Western North Carolina Railroad Company, was, that the old corporation was dissolved, for all purposes, but one, and that one was, its existence for three years, in which to wind up its affairs, the time fixed by statute. In addition to this, it was contended that the death of the intestate was caused by the negligence of a fellow-servant, to wit: the engineer in charge of the locomotive coming in collision, with the one driven by plaintiff's intestate. The trial court, the superior court, held that the old corporation was dissolved by the sale and conveyance made by the master, *as provided in section 697, of the Code of North Carolina*, and gave judgment for the defendant. From this judgment, the plaintiff appealed to the supreme court, which court overruled the court below, and directed that judgment be entered against the defendant, for the amount of the verdict, which was in favor of the plaintiff, upon the question of negligence.

The sole question, presented by the record, to the supreme court, upon appeal, was whether the corporation was dissolved. The court held it was not, and affirmed the judgment.

Section 697 provided, that, upon a sale of a corporation's property, like this, under foreclosure, or trust, the purchaser

ipso facto, by the sale, and conveyance, became a corporation.

It is, as follows:

"SEC. 697. If a sale be made under a deed of trust or mortgage executed by any corporation on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the corporation as they were at the time of making the deed of trust or mortgage, but any works which the corporation may after that time, and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it. Upon such conveyance to the purchaser, the said corporation shall *ipso facto* be dissolved, and the said purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded, in the same manner in which the conveyance be recorded."

This is a familiar statute, and was never construed, elsewhere, as in North Carolina.

"Laws allowing the purchasers at a foreclosure sale to form a new corporation, are not intended to prevent a sale or transfer to a corporation *already formed*, and *capable, under the laws of its creation*, of holding the corporate property and exercising the franchises, which pass to the purchaser by sale: (*People vs. Brooklyn, &c., Ry. Co.*, 87 N. Y., 75").

35 American State Reports, page 400, note.

It is to be noted that this statute, section 697, of the Code, is a valid statute; and provides that a sale and conveyance, *pass to the purchaser, not only the works and property of the corporation, as they were at the time of making the deed of trust, or mortgage, but any works which the corporation may, after that time, and before the sale, have constructed and all other property of which it may be possessed at the time of sale, other than debts due to it.*

There is no denial of the fact that the mortgage was valid, and conveyed the railroad, and all its property, including the franchises *of the corporation.* Nor is it denied, that, under this statute, and other laws of the State, the sale was a valid one, and that the purchaser bought the property mortgaged, *including all the franchises,* of the corporation.

This is so, notwithstanding the reply of the plaintiffs in the actions in the State court, on pages 71, 72, etc., of the Record, that the sale was a fraud, and "pretended."

Not one piece of evidence, not a scintilla, even, was offered at the trial to this effect. It was not contended for, in the superior court, nor even referred to in the supreme court. The only question was, whether, as provided in the latter clause of the statute, "such conveyance to the purchaser," the Southern Railway Company, "*ipso facto,*" dissolved the old corporation. No part of the statute was held invalid. It was only insisted that the failure of the purchaser to organize a new corporation, prevented the dissolution of the old. The superior court held the old corporation void, but was reversed by the supreme court of the State. The court failed to give any effect to the words of the statute, "*ipso facto,*"—"*by that fact, itself.*"

There was no question of negligence before the court, and none argued. The contention of the defendant was, that it was a dissolved corporation, that the engineers, James and Howard, were never in its service, at any time, that it had no power to hire the said engineers, or anyone else, its franchises, its railroad, and all of its property, having *over two years before the deaths of the said deceased James and Howard,* been purchased at the foreclosure sale, under the decrees of the circuit court of the United States, by the Southern Railway Company, a corporation of Virginia, created in that State, and operating the said road in North Carolina, according to law, and under the laws of comity.

The judgment appealed from, was, as appears on page 75 of the Record, reversed.

Further, and to restate the last few points, in the light of the statute, section 697 of the Code, copied already in this brief, there must be some one to take the place of the old corporation. There must be some corporation upon which the State may exercise its visitorial powers. In this connection, as said by Circuit Judge, Simonton, in the case several times referred to, Central Trust Company against Western North Carolina Railroad Company, 89 Fed. Rep., 24, 29, there was no pretense of any fraud or collusion, between the Central Trust Company and the Western North Carolina Railroad Company, and the purchaser, the Southern Railway Company. Nor was there the suggestion of evidence of any lease of the Western North Carolina Railroad Company to the Southern Railway Company.

The decree confirming the sale, is, in part, as follows:

"*And the court accepts the Southern Railway Company as the purchaser of all and singular, the railroad property and franchises, sold under the decree in this cause, and holds it obligated as such purchaser, to complete and fully to pay its said bid, and to comply with all the orders of this court heretofore entered, as hereafter, from time to time, to be entered by it, obligatory on such purchaser.*"

Every order, as provided, was complied with.

At this point we copy this part of the decree to show it was not final, for all purposes, and to show, also, the court *accepted the Southern Railway Company as purchaser, under its decree, solemnly entered.*

The title was in fee, executed to the complainant, the Southern Railway Company, by the master, acting under the decrees of the circuit court, *every decree and order* having been signed by the circuit court judges, in person, Hon. Nathan Goff, or Hon. Charles H. Simonton.

There must be some one, to take the place of the old corporation.

It is admitted, the Southern Railway Company, purchased the equity of redemption, at the foreclosure sale. Having

done this, what, may we ask, estate, had the Western North Carolina Railroad Company, in the property, franchises, &c.?

The only estate of the old corporation, in the same, that is to say, in the *railroad* and *franchises of the company, was an equity of redemption*, which was sold, and bought by the Southern Railway Company.

Then, at the time of the killing of James and Howard, admittedly, *employés of the Southern Railway Company*, the Western North Carolina Railroad Company, *had no property, of any kind, or character.* Nor, indeed, *had the company, had, for more than two years.*

James and Howard, were *not employed*, by the Western North Carolina Railroad Company, and *never had been.* They were servants of the Southern Railway Co., and employed, by that company, to operate one of its engines, being driven, on the railroad, purchased, under the decree of foreclosure, and sale, entered in the circuit court of the United States, in May, 1894.

In this case, as we have shown above, there was a corporation, already in existence, and it was unnecessary to organize any other. Indeed, no organization was necessary in any case, as the last clause was self-executing (87 N. Y. Rep., 75, already cited).

Section 697 of the Code, was enacted, for the purpose of supplying a corporation, to take the place of the one whose property was sold, which sale was supposed to have dissolved the old company.

There must be some one, to whom the State can look, for performance of the duties imposed by the sovereign, as a consideration for granting the franchise.

This is true, and, as the lord paramount, under the feudal system, looked to the freeholder for the performance of the feudal services, so does the sovereign, now look, to the holder of the franchise, for the performance of the duties imposed, when it was granted. It looks, we may say, to the franchise

itself, and in doing so, this performance is, by the person owning the franchise, as in this case, the Southern Railway Company.

This is a North Carolina franchise, owned by a person, of another State. The Southern Railway Company is a corporation, operating a railroad, under and by reason of the franchise, purchased, at the sale of the Western North Carolina railroad, under the decree of foreclosure and sale, passed by the circuit court of the United States, as disclosed by the record, in this suit.

The Southern Railway Company operates the *North Carolina railroad*, the property of *another* company, in North Carolina, but only by reason of the *ownership of the franchise of that company, for a term of years*. But for this, it could not operate it; and, but for *its ownership absolute, of the franchise of the old W. N. C. R. Co.*, it could not operate *it*. When the sovereign power grants a railroad charter, or, we may say, *any* charter, it does two things: It brings a person, a corporation, into existence; and then confers upon it, certain rights, privileges, sometimes, called liberties, but, always, franchises. With the *permission of the sovereign*, the corporation may dispose of its franchises, as it may, of any of its other property. But it cannot dispose of *itself*. So when the Western North Carolina Railroad Company, executed the first and second mortgages, the second, being a mortgage of its *equity of redemption*, and all the property, including its franchises, and there having been a foreclosure and sale, under that second mortgage, so far as *property was concerned*, the corporation had none left. In the face of this, it is contended, that, in satisfaction of a judgment, obtained in the State court, *three years after the corporation had lost all its property, including its franchises, upon an alleged cause of action, which did not arise until two years after the purchase of this property and franchise, the same property and franchises*, can be taken, by a process, issuing from the State court.

Justice Matthews, on page 619, vol. 112, U. S. Reports, in the case of *Memphis R. R. Co. vs. Commissioners*, says:

"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

Cook on Corporations, pages 1798 and 2130. See cited cases by this author on same pages. Pages numbered at bottom.

In the brief, some importance is attached to the fact, that A. B. Andrews, verified the answer, in the actions for negligence, prosecuted in the State court. This was on account of section 667, of the Code of North Carolina, which gave to the old company, three (3) years' time, to wind up the business of the dissolved corporation. A. B. Andrews was the president of the company, before foreclosure sale.

Section 667 of the Code is as follows:

"All corporations, whose charters shall expire by their own limitation, or shall be annulled by forfeiture, or otherwise, shall nevertheless be continued bodies corporate for the term of three years, after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions, by or against them, and to enable them gradually to settle, and close their concerns, etc., etc."

It was for this purpose the old president swore to the answer, in the State court. The law was so written. The three years had not expired, by eight (8) months.

At this point, we may further observe, that the petitioners insist, the Southern Railway Company, a Virginia corporation, could not purchase the franchise of the Western North Carolina Railroad Company, at the foreclosure sale, without express permission of the sovereign.

It is not denied, that the Western North Carolina Railroad Company had the right, the power, to mortgage its property, *including its franchise.* Under the laws of North Carolina, and its charter, the corporation was empowered to place as many mortgages, upon the same, as it saw fit. This being so, it is "obvious that legislative authority to mortgage the franchises of a corporation, carries with it an implied authority to make the mortgage *effective by bringing those franchises to a sale, and transferring them,* with the *tangible* property of the corporation, to the purchaser" (35 Amer. State Reports, page 398, note 2, citing *New Orleans, &c., R. R. Co. vs. Delamore,* 114 U. S., 501).

This being so, who could purchase? Any person could, not prohibited from doing so, by some law. Indeed, if any person or corporation in North Carolina could purchase, so could any person or corporation, of another State. It is not denied that the Southern Railway Company is capable of holding this property under a *lease.* The supreme court of North Carolina, in the *Logan case,* 116 N. C., has so decided. That is so by reason of the *power* conferred upon the *lessor corporation to lease its property.* It would not be a valid lease, however, unless the lessee was authorized to take the property under the lease. Out of what does this authority grow, or come? First, because the Virginia charter conferred upon the lessee the power to take; and, second, because of the laws of comity between the States. There is nothing in the laws of North Carolina which forbids, the purchase of the property, by a Virginia corporation. The

Southern Railway Company had the power to take under the lease. It has the power to purchase. A corporation created by one State can transact business in another State, by consent of the latter. That consent may be either express or implied. When implied, it is under the laws of comity. In this case, there being nothing to forbid the carrying on the business of the foreign corporation, in the laws of North Carolina, its consent is implied. The business of the foreign corporation, is that expressed in its charter; amongst other things and powers enumerated, in the same, is the one of authority to purchase, and operate, railroads in other States. Under this power, so conferred, by the State, creating the Southern Railway corporation, and by reason of this consent, so implied, by the State of North Carolina, even in the absence of any provision, in its laws, concerning the same, it has the power to purchase, and under that power, regardless, as we say, of the express power granted by the sections of the Code, cited, in the opinion of the circuit judge, did purchase, the franchise and other property, of the old corporation, as we have before shown.

Lafayette Ins. Co. vs. French, 18 How., 400, 407.
89 Fed. Rep., page 31.
13 Pet., 519.

The sections of the Code referred to are as follows: 671, 672, 674, and 675, vol. 1, Code of North Carolina, 265. Also, section 685, vol. 1, of the Code of North Carolina, which section we will copy in full in this brief, when we come to the argument of *liens*, together with section 1 of the act of March, 1879, brought forward, in the Code, being section 1255.

The power to mortgage is conferred by the charter of the Western North Carolina Railroad Company, reference to same, and quotation, to be found on page 126 of the Record.

Any citizen, any *individual*, had the right to purchase this property, at the foreclosure sale, whether a resident of this, or any other State.

New Orleans, &c., vs. Delamore, vol. 114, page 508, U. S. Reports.

Memphis Railroad Co. *vs.* Commissioners, 112 U. S. Rep,. 619.

Barcello *vs.* Hapgood, 118 N. Car. Rep., 728–729.

This is a matter, however, *only to be enquired into by the State* (*ibid*).

Under the laws of North Carolina, a corporation can sell, transfer, or mortgage its franchises, except, *that*, to be, and exist, as a corporation (Code of N. Car., sections 671, 673, 675, and 685).

With regard to the purchase, the word, *person*, is used; and, corporation is a *person*, under the fourteenth amendment.

"In the case of *Gulf, Colorado and Santa Fe Ry. Co. vs. Ellis*, 165 U. S. R., page 150, Mr. Justice Brewer, says: 'It is well settled that corporations are persons within the provisions of the fourteenth amendment of the Constitution of the United States (*Santa Clara County vs. So. Pac. R.*, 118 U. S., 394; *Pembina Mining Co. vs. Penn.*, 125 U. S., 181, 189; *Missouri Pac. R. vs. Mackey*, 127 U. S., 205; *Minn. & St. Louis Ry. vs. Herricks*, 127 U. S., 210; *Minn. & St. Louis Ry. vs. Beckwith*, 129 U. S., 26; *Charlotte & Columbia R. R. vs. Gibbes*, 142 U. S., 386; *Covington & Lexington Turnpike Co. vs. Sandford*, 164 U. S., 578). The rights and securities guaranteed to persons, by that instrument, cannot be disregarded, in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations, the equal protection of the law, than it has to individual citizens.'"

The following is paragraph four, subsection (a) of the charter of the Southern Railway Company, granted by the

State of Virginia, on the 20th of February, 1894. Acts of Assembly of Virginia, 1893–'94, chap. 302, p. 368:

"4. In addition to its other powers, such new corporation, shall have, and from time to time, as occasion arises, may exercise, the following powers, or any of them, namely:

"(a.) With the approval of a majority of its stockholders, given at a meeting, it may, from time to time, lease, use, operate, consolidate with, or purchase, or otherwise acquire, or be leased, used, operated by, or consolidated with, any railroad or transportation company, now or hereafter incorporated by the laws of the United States or of any of the States, thereof, or any one or more of such railroad or transportation companies, or any other railroad or transportation company or companies, which now are, or hereafter may be leased, or used, or operated by, or consolidated with, any one or more, of such railroad or transportation companies."

To say that the State lost its right of visitation and enforcement of forfeiture, for misuser and non-user, by reason of the purchase of the franchise and property of the Western North Carolina Railroad Corporation by the Southern Railway Company, is to fail to distinguish between the body corporate, and its property, a part of which, is its *franchise*. The sovereign exercises its right of visitation, and enforcement of forfeitures, upon the *franchise*, and upon the *person, owning the franchise, whether that person be a corporation, or a natural person.*

In this case, the Southern Railway Company, is the owner of the franchise, as it is of the railroad track, and cars, that run upon the track.

There can be no intelligent appreciation of the principles involved in this case, as long as, the well-defined distinction between the *franchise*, and the *corporation* is not observed.

As to the effect of permission, under the laws of comity, given a foreign corporation to do business in another State than that of its creation, etc., see Conn *vs.* Chicago, B. & Q. R. Co., 48 Fed. Rep., pages 177–180.

In this case are cited cases which support this view we present, and the latter cite cases from the Supreme Court of the United States. This needs no argument, as it has been established too long, by the decisions of this court.

It *is plain to be seen*, that the *real purpose*, in prosecuting these actions against the *old, dissolved* company, was, to *avoid a removal of the same to the United States circuit court.*

Indeed, after the actions were tried, other suits, by the same plaintiffs, for the *same cause of action*, were begun, and *stand now, for trial*, in the said court. There was no pretense that the Southern Railway Company was, or, is, insolvent.

This suggests the fact that it is said somewhere, in the briefs of petitioners, there is some antagonism between the State courts of North Carolina, and the Federal courts. This, as Judge Boyd says, in his opinion on the circuit, in this case, printed in the record, cannot be, if the courts of the State, and those of the Federal Government, will observe the laws of comity (Record, page 39).

The Federal courts and the State courts, exist under separate sovereignties, but in the same territory. The State court is a court in which the citizens of the State litigate, and adjust, their differences. The Federal courts are the common home of the citizens of different States. That department known as the judicial department, was the wisest provision in that Constitution, under which we live. The history of the Government shows this to be true.

In the case of Covell *vs.* Heyman, 111 U. S. R., page 182, Justice Matthews says:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes from concord; but between State courts, and those of the United States, it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves

nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res*, is as much withdrawn, from the judicial power of the other, as if it had been carried physically, into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

Nothing can be found in the decisions of the Supreme Court of the United States, different from what Justice Matthews has said, in this case. There are a great many cases, which support the rule contended for.

Section 720 of the Revised Statutes has no relation to this case. It is not the process that is enjoined, but its abuse; the injunction, protects the property of respondent.

The property, and franchises, protected, were sold and conveyed to the purchaser, long before November, 1896, the date of the deaths of James and Howard.

From no possible standpoint, can the Southern Railway be anything, but *a purchaser of the property, and franchises.*

If the property is in possession of the Southern Railway Company, as such purchaser, being the absolute owner of the same, how can any suit against the mortgagor, upon an alleged cause of action, having its *origin two years and three months* after the foreclosure sale and date of the deed, affect the said purchaser's title?

In the Burnett case, relied on by petitioners (123 N. C. Rep.), the *claim originated* in 1894, he Burnett being a passenger, and injured by reason of the negligence of the railroad company, *at that time.*

The deed of trust was made in 1891, and the *foreclosure in 1897*, three years *after the claim originated.*

By reason of section 1255 of the Code of North Carolina this CLAIM, which arose in 1894, became a lien upon the property, superior to that of the mortgage, and, of course, was to be paid before the purchaser, at the foreclosure sale, in 1897, could acquire the property, absolutely, and unencumbered.

In the case at bar, the purchaser took the property and franchises unencumbered, because two years *before deaths of James and Howard.*

Here the sale was in 1894, and the deaths of James and Howard in 1896, November 18th, and as said, by the circuit court of appeals, Judge Simonton, "It would be monstrous to affirm, that, in spite of this, the railroad property, and its franchises, remained in the Western North Carolina Railroad Company, subject to its debts, INCURRED AFTER THE SALE.

And so it would; it would be treating the sale, admitted to be regular and valid, as a nullity. It would be an utter failure to give effect to the decrees, orders, etc., of the circuit court of the United States.

The validity of the judgments of the State court is not questioned, in this proceeding. It is the protection of the purchaser, in the use, and enjoyment, of property conveyed, by the decree of the court, solemnly entered, from seizure, by the sheriff, directed by process, in his hands, to sell property, *if such he could find,* in satisfaction of the same, *of the Western North Carolina Railroad Company,* owned by that company, *at the date of the judgment, or, we may say, at date of origin of the claims,* of James and Howard, KILLED IN 1896, TWO YEARS AND THREE MONTHS, AFTER the Southern Railway Company became the sole owner of the said property, to wit, the railroad and franchises of the Western North Carolina Railroad Company, mortgagor.

If the killing of the said James and Howard had been before sale, and before the decree, and master's deed, as in the Burnett case, then, the *property,* and *franchises,* would have been bound, under section 1255 of the Code.

But, *then it must be established, and amount ascertained, against the person*, having the property, and operating it, *under the franchise.*

Otherwise, if twenty years elapse, after the property was conveyed, sold to the Southern Railway Company, this same property, *could be taken, and sold, under final process*, for a debt of the Western North Carolina Railroad Company—a judgment growing out of a disaster, twenty years, also, after the sale, and deed.

To accomplish the end, aimed at, in taking, in this way, the property of the Southern Railway Company, for the debt of the Western North Carolina Railroad Company, incurred, over two years, after the consummation of the title to the same, by the Southern, would be *to nullify the foreclosure proceedings of 1894*, in the circuit court of the United States. It would be in disregard of the principles laid down by Justice Shiras, in Farmers' Loan & Trust Co. *vs.* Lake Street El. R. R. Co., 177 U. S., 61.

This deed was made by order of the court, and covered all the property, and franchises, involved in this suit, and WAS MORE THAN TWO YEARS, BEFORE, the alleged claims of James and Howard, ORIGINATED.

Then, at the time of the alleged negligent homicide, of James and Howard, in 1896, servants of the purchaser, and who, at no time, were the employés of the Western North Carolina Railroad Company, which had, in no way, consented to their being employed, (and which had no power to so consent,) by the said Southern Railway Company, the old Western North Carolina Railroad Company, corporation, *had no estate, of any kind, no interest of any kind*, in the Western North Carolina railroad, or said franchises.

In the face of this fact, it is contended here, by petitioners, that, this property, these franchises, can be extended, by, and under final process, issued, upon a judgment, entered against *the Western North Carolina Railroad Company*, two years after the said sale, and, execution of the deed, by the master, in satisfaction of the same.

In the first place, at the time of the judgments, the defendant, The Western North Carolina Railroad Company, HAD NO PROPERTY OF ANY KIND; not even, a FRANCHISE, except that, to be, and exist as a corporation (Memphis R. R. Co. *vs.* Coms., 112 U. S., 610).

It is maintained, that the defendant, was liable, as a lessor. The possession of the Southern Railway Company, was not that of lessee, but as PURCHASER AT A FORECLOSURE SALE.

How was the Western North Carolina Railroad Company any lessor?

It could not be, of this property. Because, the property, and franchises, were both in possession of the Southern Railway Co., as purchaser, under the decrees of the circuit court of the United States.

It has been suggested somewhere in the briefs of the petitioners, that the parties, plaintiff, in the actions in the State courts, are enjoined from issuing executions, on their judgments. This is not true. The injunction *extends only to the protection of the property, and franchises sold by the court,* to the Southern Railway Company. It is the abuse of the process, that is enjoined (page 42 of Record).

Up to this point, in the argument, what is said has been to show the court, what are the facts. The citations made have been to show the bearing of these facts, their importance, and how they relate to one another.

We propose now to show that the respondent, Southern Railway Company, is entitled to have the decree of the circuit court of appeals affirmed.

In the first place, we call the attention of the court to the opinion of Judge Boyd, on the circuit, filed December 19, 1901, to be found in the record on page 35,—also 112 Fed. Rep., page 471; and to that of Judge Simonton, in the record, page 202, delivering the opinion of the circuit court of appeals, affirming Judge Boyd's decree. This opinion of Judge Simonton, in Fed. Rep., 115, 956, is not the one referred to, so often in the statement of the facts, that being, in another

case, on the circuit, between the same parties, reported in 89 Fed. Rep., 24. We refer to these opinions, as containing the law, applicable to this case. We have established the fact that the Southern Railway Company was the absolute owner of the Western North Carolina railroad, and franchises of the corporation, by reason of its purchase of the same, at the foreclosure sale, in August, 1894, which sale, was made under the decrees of the circuit court, of the United States, as they appear in the record.

It also appears here, that, the Southern Railway Company, was in no way, a party to either one of the actions in the State court, for negligence, in which the judgments were obtained, one by Mrs. James, admx., for $15,000, and the other by Mrs. Howard, admx., for $5000. It is not denied that there are depending in the circuit court of the United States, for trial, now, in Statesville, in the western district of North Carolina, these same cases, James, admx., *vs.* Southern Railway Company, and Howard, admx., *vs.* Southern Railway Company, both based upon the same facts. It was said and argued in the circuit court of appeals, that it should be a right of a State to have its own courts try the cases that arise in its domain. That may be so, but here are cases in which one party is a citizen of Virginia, and the other, a citizen of North Carolina.

The complaint is, that our client removes its cases to the United States circuit court, for trial. This is so, if it can be done. This is the reason the two cases were brought against the old dissolved corporation. Everybody knows that. It was to avoid the Federal court.

In North Carolina, strange and new doctrines have crept *into the law* of negligence: for instance, a peculiar negligence known as "*continuing*" negligence, which, of course, destroys the defense of contributory negligence.

Greenlee *vs.* R. R., 122 N. C., 977.
Troxler *vs.* R. R., 124 N. C., 189.
Hardin *vs.* R. R., 129 N. C., 354.

It is a doctrine in North Carolina, that if contributory negligence is set up as a defense, there must be what is called a fourth issue, which is: "Notwithstanding the *contributory negligence*, could the defendant have avoided the injury?" Contributory negligence is made a defense by statute, and the burden of proving it, is upon the defendant. That is to say, notwithstanding this *perfect defense*, yet the plaintiff can recover.

Pickett *vs.* R. R., 117 N. C., 616.
Upton *vs.* R. R., 128 N. C., 173.

So it is in North Carolina, there is no such thing as proximate cause, as we understand it (Greenlee *vs.* R. R., 122 N. C., 977).

Another thing, it is held, that if a servant is injured, or killed, the presumption is the same, in his case, as in that of a passenger (Wright *vs.* R. R., 127 N. C., 222).

We are illustrating why it is, the foreign corporations remove their cases to the United States courts, if the jurisdictional facts can be made to appear. The Federal courts, which we have shown, are the common home, of citizens of different States, are treated as unfriendly courts. In the light of these facts, no one can blame a foreign corporation for removing its case to the circuit court of the United States. North Carolina is the only State in the Union where a lessor railroad company is held liable for the tort of the lessee, when the lease is made under a power granted in the charter, to lease the railroad and its franchises of the corporation. As before said, in the case of Arrowsmith, Judge Lurton has shown, that no other State has so held, nor can any case be found in the Federal jurisdiction to sustain this doctrine.

These things are not said, out of disrespect for the North Carolina Supreme court: indeed, far from it. It is only to show why our client, when it can do so, removes its cases to the Federal courts, for trial.

But, as we say, the Southern Railway Company was not a party, defendant, in either one of the cases, in which the State courts rendered the judgments, which the defendant, Sheriff Julian, is attempting to satisfy, by a sale of its property, under section 674, of the Code of North Carolina, already copied on page — of this brief. This is in direct violation of the fourteenth amendment to the Constitution of the United States.

The process is against the Western North Carolina Railroad Company; and directs the sheriff to extend the property of *that defendant*, in satisfaction of the executions, as *owned at the time of the docketing of the judgments, which was in 1898.* So we have here, the purchase of the property by the Southern Railway Company, in 1894, in August; the deaths of James and Howard in November, 1896, and the judgments in 1898, against the Western North Carolina Railroad Company, alone, a corporation, *with no property of any kind.*

There is not only no *due* process of law, but *none* at all, in so far as the Southern Railway Company is concerned. There were notices of sale of property owned by the Southern Railway Company, when the Western North Carolina Railroad Company was the *only defendant*, named in the *judgments, executions,* or *actions.*

Here was a plain statute, already quoted in this brief, section 674 of the Code, requiring the officer to "immediately, after sale, deliver to the purchaser, possession of all the corporate real property, connected with the franchise belonging to such corporation," etc.

Instead of obeying the statute, the sheriff, as will be seen in a former part of this brief, advertised the property and franchises *by name, the same that the Southern Railway Company had purchased in fee in 1894*, and which it had been operating as sole owner ever since, and is today operating. (See copies of executions and notices of sale in first part of this brief.)

Then what was the complainant to do? Here was a trespasser; of course the company could have sued him, but that was not adequate relief because he had levied upon all this property, and was prepared to deliver 300 miles of railroad into the hands of the purchaser "immediately after sale." It was irreparable damage. The foreclosure suit was still pending, and is now, as will appear by reference to a transcript marked A, filed in the papers, and which will explain itself. It is printed as an appendix to this brief.

There was a proceeding, by way of an intervention, on the part of the petitioner, one, Goodson, who claimed to be injured, and the same was tried at the November term of the circuit court of the United States, in Asheville, 1903. The plaintiff, or petitioner, obtained judgment for the amount set out in the transcript. This proceeding was under a like provision of a decree of confirmation of sale, to be found in the paragraph at the bottom of pages 114–115 of the Record.

How could *these claims* be liens, obligations, when the deaths of James and Howard, were two years after the sale of the property, and franchises? As it is, it is a claim,—judgments,—against the old Western North Carolina Railroad Company based on events transpiring two years after its property was sold to the Southern Railway Company, which had been adjudicated the absolute owner of the same in 1894.

In satisfaction of these judgments, the sheriff of Rowan county advertised for sale, as before said, 300 miles of railroad; although not authorized or empowered to do so, by the process in his hands, which only applied to the *property owned by the defendant, The Western North Carolina Railroad Company* in 1898, the date of the docketing of the judgments in Rowan county. This proceeding of the intervenor, Goodson, as said before, in the circuit court, was in a foreclosure suit, leave having been obtained to intervene, so that petitioner's damages could be ascertained, in accordance with the paragraph of the decree just referred to, to be

found on the said page of the record, 114. (See appendix to this brief.)

So, that this foreclosure is still pending, for the purposes, set out in said paragraph; and therefore, this supplemental bill, to render the decrees of sale, effective, and to secure to the purchaser, the enjoyment of the property, purchased under the same.

In this foreclosure proceeding, when did the jurisdiction of the circuit court attach? When the bill was filed, and process issued, on the 20th of April, 1894 (page 90 of the Record). The date of the decree of foreclosure was the 2d of May, 1894. At this time, this property and franchise came within the jurisdiction of the circuit court. (See page 108 of the Record.) When the bill of foreclosure was filed, in the circuit court of the United States, and the process issued, and the decree of foreclosure entered, this property was in the hands of the *court*, and no other court, State or Federal, could interfere in any way, with it, or the proceedings, in that suit. The rule has been declared to be of especial importance in its application to Federal and State courts (Farmers' Loan & Trust Co. *vs.* Lake St. Ry. Co., 177 U. S. R., 51-61.) This is an opinion of Justice Shiras. The justice says this jurisdiction cannot be defeated. Any process which seeks to interfere, says Justice Matthews, in Covell *vs.* Heyman, (111 U. S. R., page 182,) is void. As already said, in a former part of this brief, quoting from his opinion, "To attempt to seize it, by a foreign process, is *futile and void.*"

In the case of Harkrader *vs.* Wadley, 172 U. S. R., 148, Mr. Justice Shiras says:

"That the prohibition in section 720, does not apply, *when the jurisdiction of a Federal court has first attached.*"

Judge Boyd, quoting from his opinion, says that this is so in "ancillary bills," filed in the Federal court, *to enforce their own judgments and decrees, by preventing defeated*

parties from wresting property from plaintiffs, who, by final judgments, or decrees, are entitled to it (112 Fed. Rep., 477).

The leading case upon this question is Covell *vs.* Heyman, 111 U. S. R., 179, already cited, and quoted from, in this brief. This opinion of the court was written by Justice Matthews, one of the great lawyers of his day. Indeed, since this decision, we thought the principles, laid down then, had become so firmly fixed, that no intelligent lawyer could be found to contend to the contrary.

Said Justice Matthews in this case:

"The point of the decision in Freeman *vs.* Howe, *supra*, is that when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law and within the exclusive jurisdiction of the court from which the process was issued for the purpose of the writ; that the possession of the officer cannot be disturbed by process from any State court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, State or Federal, having jurisdiction over the parties and the subject-matter. And, *vice versa*, the same principle protects the possession of property while thus held, by process issuing from State courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.

"That which cannot be done by final process is equally out of reach of original or mesne process."

Covell *vs.* Heyman was an action, by which the State court of Michigan took from the United States marshal certain personal property, which, it was alleged, the marshal had wrongfully seized, under a writ of execution, issued upon a judgment of the circuit court, of the United States, in Michigan.

At this point, we call the attention of the court to the case of Phelps *et al. vs.* Mutual Reserve Fund Life Association, 112 Fed. Rep., 453. In this case, sixth circuit court of appeals, Judge Lurton delivered the opinion, and all the cases upon this question, involving the laws of comity between the courts, are cited, and commented on. There can be no question as to the correctness of the position we take. This property and franchise came within the jurisdiction of the circuit court, when the foreclosure proceeding was begun, and this court will retain it to the end. Any process foreign to this is void. This property being in the hands of the court, or its purchaser, how, may we ask, can the decrees of the circuit court of the United States, the decree of foreclosure and sale, and confirmation of sale, be made effective, unless by the injunctive process of the court, in view of the facts, in the record, called to the attention of the court, in this brief?

There was but one other remedy, and that was the action of trespass, *vi et armis*. This was inadequate, because section 674, under which the sheriff advertised the sale, and was acting, required him to deliver the corporate possession immediately after sale of the railroad to the purchaser, that is to say, 300 miles of railroad, the said sheriff was to deliver *immediately* after sale. Section 674 is copied in a former part of this brief, to which reference has several times been made.

The Federal courts of equity will not entertain a bill for relief where a plain, adequate and complete remedy exists at law, *but this remedy must be at law in the Federal courts.*

The existence of such a remedy at law in a State court, will not oust the Federal courts of equity, of jurisdiction.

The judiciary act of 1789, is section 723 of the Revised Statutes. It provides that "suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had *at law*."

The adequate, complete remedy *at law*, is the test of the equitable jurisdiction of the Federal courts.

Payne vs. Hook, 7 Wall., 425.
McConihay vs. Wright, 121 U. S., 201, 206.
National Surety Co. vs. State Bank, 120 Fed. Rep., 595; and cases cited.

This act of 1789 is merely declaratory. It made no alteration whatever in the rules of equity on the subject of legal remedies. It merely expressed the law which had governed proceedings in equity ever since their adoption in the courts of England.

Whitehead vs. Shattuck, 138 U. S., 146, 150.

But when the Federal courts of equity refuse to entertain a bill where the complainant has a complete remedy "at law," *what* courts of law are contemplated? Does this mean that if an adequate and complete remedy exist at law in either a *State* or a *Federal court*, equity is without jurisdiction, or does it mean that unless there exists an adequate and complete remedy at law, in the *Federal* court, equity will take jurisdiction?

There must be an adequate remedy on the law side of the *Federal court*, or the equity court will possess jurisdiction.

The rule is stated by Mr. Justice Gray, in *Buzzard vs. Houston*, 119 U. S., 352, in the following words:

"Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the *equity side* than on the *common-law side*."

"Parties who are entitled to resort to the Federal courts, to have their rights adjudicated, cannot be turned away because *State laws* may give them an adequate remedy in a *State* court" (*Hoey vs. Coleman*, 46 F. R., 223).

The jurisdiction of the Federal courts of equity is *uniform* throughout the United States.

Payne vs. Hook, 7 Wall., 425.
Kerby vs. Lake Shore, etc., R. R. Co., 120 U. S., 128.
Hull vs. Dills, 19 F. R., 657.

It cannot, therefore, in the nature of things, be *varied* by State laws or statutes. This phase of the question has been repeatedly considered by the courts. In *Payne vs. Hook*, 7 Wall., 429, the contention of the defendant was stated by Mr. Justice Davis to be this:

"In other words, as the complainant, were she a citizen of Missouri, could obtain redress of her grievances only through the local court of probate, she has no better or different rights because she happens to be a citizen of Virginia."

But the court was of opinion that, as a citizen of one State has the constitutional right to sue a citizen of another State in the Federal court, instead of resorting to a State tribunal, the right would be worth nothing, if the court was limited in its power to afford a suitable measure of redress.

A plain and adequate remedy existed in the State courts of law. While the State opened wide the door for a suit at law, it restricted the suit to the probate courts. This limitation, as we have seen, was held *to be inoperative as to those whose citizenship entitled them to sue in the Federal court* whether they sued on the law or the equity side, was determined by the adequacy of the relief which the *Federal court* could grant on its law side. *The State court and the State statute were left entirely out of consideration.*

And so it was determined in *McConihay vs. Wright*, 121 U. S., 201. That was a case of a bill in the Federal court,

sitting in West Virginia, to quiet title to lands in that State.

A demurrer was interposed on the ground that complainant had an adequate remedy at law, inasmuch as a statute of that State, gave the right to maintain such actions, and to persons out of possession the right to maintain ejectment. But the demurrer was overruled on the ground that—

"No change in State legislation, giving, in like cases, a remedy by action at law, can of itself curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law which is the test of equitable jurisdiction in these courts, is that which existed when the judiciary act of 1789 was adopted, *unless subsequently changed by Congress.*"

And Davis, justice, said in *Payne vs. Hook*, 7 Wall., 425–430, that—

"The equity jurisdiction of the Federal courts is subject to neither limitation or restraint by State legislation, and is *uniform* throughout the different States of the Union. * * * The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend upon the character of the case, as disclosed in the pleadings."

The State and Federal courts are foreign jurisdictions to each other. A plea in a State court of "former suit pending," is not good when the suit is pending in a Federal court.

Latham vs. Chaffee, 7 Fed. Rep., 583.
Stanton vs. Embry, 93 U. S., 544.
Gordon vs. Gilfoil, 99 U. S., 178.
Ins. Co. vs. Barnes, 96 U. S., 593.
Sharon vs. Hill, 22 Fed. Rep., 30.

The truth is, a court of equity can do anything, to protect a purchaser like the Southern Railway Company, purchasing from the court under its decrees, as heretofore set out. But upon this point enough has already been said.

The case of Railroad *vs.* Burnett is cited in the brief of petitioners, to show that these judgments of James and Howard are liens upon this road and franchise. We are unable to see any similarity between this case and that under section 1255 of the Code of North Carolina. That section is as follows:

"Mortgages of corporate companies upon their property, or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property, or earnings, of such incorporations from execution, for the satisfaction of any judgment obtained in courts of the State against such incorporation, for labor performed, nor for material furnished such incorporation, nor for torts committed by such incorporation, its agents, or employees, whereby any person is killed, or any person, or property, injured, any clause, or clauses, in such mortgage, to the contrary, notwithstanding."

Section 685 of the Code of North Carolina is as follows:

"Any corporation may convey lands and all other property, which is transferable by deed, by deed of bargain and sale, and signed by the president, or presiding member or trustee, and two other members, of the corporation, and attested by witnesses. But any conveyance of its property, *whether absolutely, or upon condition, in trust, or by way of mortgage, executed by any corporation*, shall be void, and of no effect as to the creditors of said corporation, existing prior to, and at the time of the execution of said deed, *and as to torts* committed by such corporation, its agents or employees, *prior to, or at the time of the execution of said deed: Provided*, said creditors, or persons injured, or their representatives shall commence proceedings, or actions to enforce their claims against said corporation, within sixty days after the registration of said deed, as required by law."

These two sections are to be read, and construed together, and the case of Burnett is to be read in the light of the facts of that case. When so read, it has no application to the case at bar, whatever.

In the Burnett case, 123 N. C. Rep., the *claim originated* in 1894, he, Burnett, being a passenger, and injured, by reason of the negligence of the railroad company, *at that time.*

The deed of trust was made, in 1891, and the *foreclosure in 1897*, three years *after the claim originated.*

By reason of section 1255 of the Code of North Carolina, this CLAIM, which arose in 1894, became a lien upon the property, superior to that of the mortgage, and of course, was to be paid, before the purchaser, at the foreclosure sale, in 1897, could acquire the property, absolutely, and unencumbered.

In the case at bar, the purchaser took the property, and franchises, *unencumbered, because two years, before deaths of James and Howard.* This, we repeat.

Here the sale was in 1894, and the deaths of James and Howard in 1896, November 18th, and as said, by the circuit court of appeals, Judge Simonton, "It would be monstrous to affirm, that, in spite of this, the railroad property, and its franchises, remained in the Western North Carolina Railroad Company, subject to its debts, INCURRED AFTER THE SALE.

And so it would; it would be treating the sale, admitted to be regular and valid, as a nullity. It would be an utter failure to give effect to the decrees, orders, etc., of the circuit court of the United States.

The validity of the judgments of the State court is not questioned, in this proceeding. It is the protection of the *purchaser*, in the use, and enjoyment, of *property conveyed, by the decree of the court*, solemnly entered, from seizure, by the sheriff, directed by process, in his hands, to sell property, *if such he could find*, in satisfaction of the same, *of the Western*

North Carolina Railroad Company, owned by that company at the date of the judgment, or, we may say, at date of origin of the claims, of James and Howard, KILLED IN 1896, TWO YEARS AND THREE MONTHS, AFTER the Southern Railway Company became the sole owner of the said property, to wit, the railroad and franchises of the Western North Carolina Railroad Company, mortgagor.

If, at the time of the deaths of James and Howard, the Western North Carolina Railroad Company *had been operating the railroad, under its franchise, and the said James and Howard had been servants of the road, or passengers*, as in the Burnett case, and if, after that time there had been a foreclosure sale, etc., then the purchaser would have taken, with notice of the claims of James and Howard, because of section 1255. Also, as here, there is a provision in the decree of foreclosure and sale that such claims are to be paid before the purchaser can take a perfect title, the same already quoted in this brief, and to be found at the bottom of page 114, of the printed Record, and continued on page 115.

It can certainly have no application to these judgments, because the sale under foreclosure, was over *two years before the deaths of James and Howard*. At that time, in two decrees, the circuit court of the United States had adjudicated that the Southern Railway Company was the absolute owner, free from all incumbrances, and liens, of this property, the franchises and railroad, and all other property of the Western North Carolina Railroad Company.

Or to make another illustration, suppose in the actions depending in the United States circuit court, now, for these same deaths, against the Southern Railway Company, there should be a recovery, James and Howard being the servants of the said company, *never in fact*, having been employed by the Western North Carolina Railroad Company, *at any time*, the Southern Railway Company, corporation, would not be allowed to say, the railroad was under mortgage, which was precedent to the judgment liens; why? Because of this

statute, 1255. It might be, the company, owning and operating the railroad was insolvent. That would make no difference, the property would be bound under the statute. It is a good and useful law.

These actions are on the docket for trial, in the Federal court, and will never be tried, as long as the plaintiffs can avoid it, because any lawyer knows the two engineers, are fellow-servants, under the decisions of this court, the deaths of James and Howard having been caused by the negligence of the engineer, on the engine colliding with the one James and Howard were driving. This was before the repeal of the law of fellow-servants. (B. & O. R. R. Co. *vs.* Baugh, 149 U. S., and Ross case, in 112 U. S.).

As before said, the franchise, and the railroad property, go together, and the amount of the claim, the damages, *must be established*, against the *corporation operating the road, under the franchise, as in* this case, the Southern Railway Company.

If the supreme court of North Carolina had adverted to the difference between a franchise *of the corporators*, and *of the corporation*, there would have been no such suit, as the one at bar.

It is impossible, to have an understanding of the principles here involved, unless the distinction referred to, and so well pointed out, by Justice Matthews, in the Memphis Railroad case, in 112 U. S. R., copied in this brief, is observed. This is elementary, and we might say, the very A B C, of the law. The franchise to exist, as a corporation, is one thing; and, the franchise, of the corporation, another. All of the franchises of the corporation, according to law, were sold, and bought by the Southern Railway Company, in 1894. How then could the Western North Carolina railroad corporation, run a railroad, employ operatives, etc.? It could not, because, after August 1894, the mortgagor had no power to operate a railroad. Why? Because, the franchise cannot be separated from the corporate property sold with it. It is suggested, in the James case, 121 N. C. Rep.,

that the Southern was running the road at the time of James' and Howard's homicide, as agent of the Western North Carolina Railroad Company. How could this be, when two decrees of the circuit court of the United States, one of foreclosure, and the other, of confirmation of sale, two years before these deaths, had adjudicated the Southern Railway Company, the absolute owner of both, franchises and corporate property, sold?

The court never could have arrived at such a conclusion, if this distinction, we mention, had been noticed. By whom were James and Howard, deceased, and intestates of petitioners, employed? It is not denied, but that both, were, by the Southern Railway Company. As before said, *they never had been employed, at any time*, by the Western North Carolina Railroad Company. There is no reason for further arguing such a proposition as this.

It is contended that, in the case of James, adm'x, *vs.* Western North Carolina Railroad Company, it was held, a lessor was liable, in an action against it, for the tort of the lessee, in sole possession of the railroad, and operating it, under a lease made under a power given, and granted, in its charter, by the State, the lessee's charter granting the right of the lessee, to take and operate, the same, under the franchise, so leased, also, by the authority of the State.

It would not be noticed here, but for the fact that such is the contention in this case, as we see it in the brief. In the first place, where is there any evidence of a lease here? The Southern Railway Company claims under no lease, and no effort was made, at any time, in all this litigation, to show there was a lease.

Indeed, on the contrary, how, if there be a lease, by authority, can the Southern Railway Company be lessee, and agent, both?

In cases where a railroad corporation undertakes to lease its property, *with no power*, the courts hold the alleged lessee, is an agent.

We have already called the attention of the court in this brief to the case of Arrowsmith, 57 Fed. Rep., and Judge Lurton's opinion, in which he shows that no lessor, by authority of law, has ever been held liable for the tort of the lessee, by any court, in the United States, Federal or State.

We do not believe any case can be found, except in North Carolina, to that effect. No decision of the United States Supreme Court, to that effect, can be found.

And yet, in the case of Hardin *vs.* Railroad, 129 N. C., 354, it is held, that the lessor, in a case of that kind, is liable. Many cases are cited by the learned justice, in support of that contention, all found in a note, in vol. 20, (new series) of American and English Railroad Cases.

In that case, there was a dissenting opinion, by Justice Cook, who showed clearly, that, not one of the cases relied on, was where the State had granted to the lessor in its charter, or otherwise, *the power to lease.*

The defendant, in that case, was The North Carolina Railroad Company, which had leased its railroad and franchises, to the Southern Railway Company, *by authority of law.* The plaintiff was a servant of the lessee.

Every action growing out of a disaster, on the line of that railroad, more than 200 miles long, if it be one of importance, when more than $2000 is demanded, is brought *solely* against the lessor. There has never been any attempt to show, in any case in North Carolina, so holding, the principle upon which it was so decided.

In the case of Hardin, we believe all of them are cited. There *can be* no argument made, to sustain these decisions.

In saying what we do, it is not intended to manifest any disrespect for the North Carolina supreme court. We think it a learned court, and one that justly stands high, in the other States of the Union.

We trust to be permitted to say, that, in our humble judgment, when the lessor's property is taken, for the tort of the Southern Railway Company, lessee, the latter being no party

to the action, upon a simple allegation in the complaint, that the lessor is so liable, with no power to even employ a lawyer, when its franchise is leased with the permission of the State, with no power to hire a servant of any kind to operate the road, etc., etc., is taking and depriving the lessor of its property, in satisfying the judgment, without due process of law.

We have been betrayed into making these remarks, because of the contention suggested in the briefs, of petitioners, based on James' case.

The preparation of this argument, has been in the light of that of Judge Simonton, as contained in his opinion in the case, filed in the circuit court of appeals, to be found in the record, and also in 115 Fed. Rep., 956–963. We believe he has exhausted the subject in his opinion, to which we call the attention of the court.

On page 962, of the vol. 115, Judge Simonton says:

"The act of the sheriff in levying on this property, clearly was illegal. And, inasmuchas under the law of North Carolina, it would have been his duty to have put the purchaser into immediate possession," (section 674, quoted in this brief) "and into the enjoyment and use of all the franchises of the company, and so work irreparable injury to the Southern Railway Company, the owner, in possession, the court, having the right, and authority, to do so, was bound to issue its writ of injunction (Marshall *vs.* Holmes, 141 U. S., 596; Barrow *vs.* Hunton, 99 U. S., 80)."

We can do no better than quote this paragraph from Judge Simonton's opinion, as a proper close of this argument.

We think the decree of the circuit court of appeals should be affirmed.

CHARLES PRICE,
Solicitor for Respondents.

WILLIAM A. HENDERSON,
FABIUS H. BUSBEE,
Of Counsel.

APPENDIX.

UNITED STATES OF AMERICA,
Western District of North Carolina.

IN THE CIRCUIT COURT.

CENTRAL TRUST COMPANY OF NEW YORK and W. P. CLYDE ET AL.
vs.
RICHMOND & DANVILLE RAILROAD COMPANY and RICHMOND & WEST POINT TERMINAL AND WAREHOUSE COMPANY.

PETITION OF MARCUS J. GOODSON.

To the honorable the circuit court of the United States:

The petition of Marcus J. Goodson respectfully showeth:

1st. That prior to the 15th day of June, 1892, and before the times hereinafter mentioned, the Richmond and Danville Railroad Company, a corporation organized and existing under the laws of the State of Virginia, had, through purchase or acquisition of stock, or by written lease or operating contract, obtained the possession and control of the franchises and property of the Atlanta & Charlotte Air Line Railroad Company, a corporation duly chartered and existing under the laws of the States of Georgia, South Carolina and North Carolina, whose line of railroad extended from the city of Charlotte in the State of North Carolina, passing through the State of South Carolina, to the city of Atlanta in the State of Georgia; and were, on and prior to said dates, by reason of such acquisition, written lease or operating contract operating said line of railroad with the cars, locomotives and other appliances and appurtenances thereto belonging, in the carrying on of a general railroad business.

2nd. That on said 15th day of June, or about that time, an order was made by this court, in the above entitled cause, appointing Frederick W. Huidekoper, of Meadville, Pennsylvania, and Reuben Foster of Baltimore, Maryland, temporary receivers of all the property of the said Richmond & Danville Railroad Company, with all and singular the rights, powers, titles, duties and obligations set forth in said order of appointment and in a supplemental order thereafter entered in said cause; and on the 16th day of August, 1892, by a further order entered by this court in said cause, the said Frederick W. Huidekoper and Reuben Foster were made permanent receivers, and invested with all and singular, the rights, powers, titles, duties and obligations set forth in the original and said supplemental order of appointment. That afterwards, on or about the first day of August 1893, Samuel Spenser was, by this court, appointed with said Frederick W. Huidekoper and Reuben Foster, as receiver of said Richmond & Danville Railroad Company and its property in the above entitled action, and he and they together continued to act as such receivers until the — day of December, 1894, when by an order of the circuit court of the United States, for the district of Maryland, the said Frederick W. Huidekoper, and Reuben Foster, were relieved as such receivers and discharged as such, and the said Samuel Spenser then became, is now and has continuously since remained sole receiver of the Richmond & Danville Company and its property.

3rd. That from and after the appointment of said receivers, as above alleged and continuously up to and including the 11th day of July, 1893, and at the times hereinafter mentioned, they, the said receivers, by virtue of the authority given to them by said orders of appointment, became and were possessed of the property, rights, privileges, franchises and appurtenances belonging and appertaining to the Atlanta & Charlotte Air Line Railroad Company, and used and operated the same, the said line of railroad, with the cars, locomotives, and all the other appliances and appurtenances thereto belonging in carrying on a general railroad business.

4th. That the petitioner, on the 11th day of July, 1893, at the time of the committing of the grievances hereinafter mentioned, was in the employment of said receivers, as a switchman upon said line of railroad, between Charlotte,

North Carolina, and Atlanta, Georgia; and it was the duty of the said receivers to provide safe appliances, machinery and means to enable the petitioner to safely do and perform the work required of him as such switchman of said receivers; to provide suitable and safe places to do and perform the work required of him as such switchman; to provide other servants and employees, sufficient in number, skillful and competent for the performance of the work required and necessary to be done; to provide such suitable, sufficient, safe, secure and good cars, ladders, tracks, side tracks, switches, yards and yard room as would enable the petitioner to safely perform the work required by his said employment.

5th. That yet the said receivers, not regarding their duty, conducted themselves as such receivers so carelessly, negligently and unskillfully in this behalf that they did not provide safe appliances, machinery and means to enable the petitioner to safely do and perform the work required to be done by him as such switchman, and they did not provide other servants and employees, sufficient in number, skillful and competent, for the performance of the work required to be done; nor did they use due care in the selection of said servants and employees as they did select, but negligently and carelessly employed incompetent and unskillful servants and employees and an insufficient number of such other servants and employees, and did not provide suitable, sufficient, secure and good cars, ladders, tracks, side tracks, switches, yards, and yard room, as would have enabled the petitioner to safely perform the work required by his said employment; and conducted themselves so carelessly, negligently and unskillfully in this behalf that they as such receivers placed one of their cars upon a side track near to and close beside the main track of said railroad and only a few inches, less than one foot, from the same, and so that a train or car passing upon said main track would be obstructed by the same, and so that one climbing upon a ladder attached to a car passing upon said main track, as was required of switchmen in their employment, would be knocked and thrown therefrom by being struck and thrown against said car on said side track; and they, said receivers, knowingly and so carelessly, negligently and unskillfully permitted said car to so remain and be upon said side track near to and close beside said main

track; and conducted themselves so carelessly, negligently and unskillfully as such receivers, in this behalf, that they, while said car was so carelessly, negligently and unskillfully placed and standing upon said side track so near to the main track as was well known to them, but unknown to the petitioner, rapidly backed and pushed a car upon which it was the duty of the petitioner by reason of his said employment to be, at an unusual and dangerous rate of speed, by means of an engine attached thereto, down and upon said main track and beyond said car standing upon said side track. 6th. That for want of due care and attention and because of the carelessness negligence and unskillfulness in that behalf and in the matters and things above and below alleged on said date July 11th, 1893 on the line of said railroad aforesaid, at or near Spartanburg South Carolina, and while the said appliances, machinery, means, cars, ladders, employees track side track and yards were in the use and service of the said receivers upon about and in connection with said railroad and while the petitioner was engaged in said work and in the duties of his said employment as switchman for said receivers and while he was climbing upon one of said cars by means of a ladder attached thereto which car was then being rapidly backed and pushed at an unusual and dangerous rate of speed by means of an engine attached thereto upon the main track of said railroad and near to the car standing aforesaid upon said side track, he, being at the time wholly unaware of danger and without any fault or negligence on his part, was violently knocked and thrown against said car so standing on said side track and thence with great violence thrown down upon the ground, whereby he received great bodily injury and was made sick, sore, lame and disabled and his spine permanently injured, his back and side lacerated and bruised, one or more of his ribs broken and his testicles so affected inflamed and diseased that it became necessary that they should be removed and the same were removed, and whereby he was caused and suffered great pain and whereby he was caused to lose his vitality and manhood and to become permanently an invalid, and whereby he was then and there hindered from attending to any business whatever and permanently disabled from doing any kind of labor, and has ever since remained and continued sick, sore, lame and disabled and will perma-

nently remain so, and was put to great expense in trying to be cured and suffered and still continues to suffer great pain of body and mind by means of such injury to his damage forty thousand dollars ($40,000).

Wherefore, your petitioner prays this honorable court that it cause to be paid to him said sum of forty thousand dollars ($40,000) as damages so sustained by him as aforesaid, said sum to be so paid by said receiver out of the funds now in his hands as such receiver and which may hereafter come into his hands as such receiver; that if the court deem proper it cause to be enquired into by proper issues submitted to a jury, the truth of the matters alleged in this petition: and that it grant to said petitioner any other or further relief to which he may be entitled, and any relief which to this honorable court may seem just in the premises.

(Signed) MOORE & MOORE,
Attorneys for the Petitioners.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

Marcus J. Goodson, being duly sworn, deposes and says: I am the Marcus J. Goodson the petitioner named in the foregoing petition and have heard said petition read and know the contents thereof and the same is true of my own knowledge, except as to the matters therein stated on information and belief and as to those matters, I believe it to be true.

(Signed) M. J. GOODSON.

Sworn to and subscribed before me this day.

Witness my hand and official seal on this the 4th day of April, 1896.

R. O. PATTERSON,
Clerk U. S. Courts,
By A. S. PATTERSON, *Deputy.* [SEAL.]

Filed April 4, 1896.

R. O. PATTERSON, *Clerk.*

A true copy.
Test: W. S. HYAMS,
Clerk U. S. Circuit Court,
at Asheville, North Carolina.

[Endorsed:] No. —. United States of America, western district of North Carolina. In the circuit court at Asheville. Central Trust Co. of New York *et al.* against Richmond & Danville Railroad *et al.* Petition of Marcus J. Goodson. W. S. Hyams, clerk.

UNITED STATES OF AMERICA,
Western District of North Carolina.

IN THE CIRCUIT COURT.

CENTRAL TRUST COMPANY OF NEW YORK and W. P. CLYDE ET AL.
vs.
RICHMOND & DANVILLE RAILROAD COMPANY and RICHMOND AND WEST POINT TERMINAL AND WAREHOUSE COMPANY.

AMENDED PETITION OF MARCUS J. GOODSON.

Marcus J. Goodson amending his petition by consent of the parties hereto further respectfully showeth:

I.

That on the 19th day of June 1893, being at the time entirely inexperienced as a switchman, only twenty-two years of age and entirely without knowledge of the duties required of him as a switchman, as was well known to said receivers was employed as such switchman by said receivers, as stated in his original petition, said employment being hazardous and dangerous, as was also well known to said receivers, who though so knowing of the hazardous and dangerous character of the duties required of such switchman failed and neglected to give him notice thereof, and failed and neglected to give him such instruction concerning such employment and such hazards and dangers, as was reasonably required of them, because of the youth and inexperience and want of capacity of the petitioner.

II.

That as the petitioner is advised and believes it was incumbent upon such receivers and it was a part of the duties devolved upon them to promulgate proper and sufficient rules and regulations for the working, operation and management of their said yard, tracks, side tracks, switches, cars, engines and other machinery and appliances used in connection with or upon the said yard, tracks, side tracks, switches, &c., and to make known the same to its switchmen, particularly the petitioner, employed thereat for their safety and protection; but as he is informed and believes and now avers, the said receivers in violation of their said duties did not promulgate any such proper and sufficient rules and regulations for the working operation and management of said yard, tracks, side tracks, switches, cars engines and other machinery and appliances used on or in connection therewith.

III.

That further amending said petition he inserts between the word "railroad" in the sixth line from the top of the third page thereon, in the word "between" in said line and words "at Spartanburg, South Carolina" and by inserting between the word "selection" in the sixth line from the bottom of the third page and the word "of" in said line, the words "and retention in their employ" and by inserting between the word "employ" in the fourth line from the bottom of the third page and word "incompetent" in said line, the words "and retained in their employ."

(Signed) MOORE & MOORE,
Attorneys for the Petitioner.

STATE OF SOUTH CAROLINA,
County of Spartanburg.

Marcus J. Goodson, being duly sworn by me—W. H. Darden, a notary public in and for the county of Spartanburg, State of South Carolina at my office in the city of Spartanburg in said State says that he has heard read the foregoing amended petition and knows the contents thereof; that as to these matters therein stated of his own knowledge

he knows it to be true; that as to those matters therein stated on information and belief, he believes it to be true.

(Signed) MARCUS J. GOODSON.

Subscribed and sworn to before me this the 31st day of March, 1897.

In witness whereof I have hereunto set my hand and official seal.

(Signed) W. H. DARDEN,
Notary Public for the County of Spartanburg & State of South Carolina.

STATE OF SOUTH CAROLINA, }
County of Spartanburg. }

I, T. R. Trimmier, clerk of the circuit court in and for the county and State aforesaid, do hereby certify that W. H. Darden whose genuine signature appears to the foregoing instrument hereto attached was, at the time of signing the same, a notary public duly commissioned under the laws of this State, and that his official acts as such are entitled to full faith and credit.

Witness my hand and seal of said court at Spartanburg court house, South Carolina, this 31st day of March A. D. 189–.

(Signed) T. R. TRIMMIER,
[SEAL.] *Clerk of Circuit Court.*

Filed in this office Mar. 30, 1897.

C. B. MOORE, *Clerk.*

A true copy.

{ Seal United States Circuit Court, Western Dist. of N. C., at Asheville. }

Test: W. S. HYAMS,
Clerk U. S. Circuit Court.

[Endorsed:] No. —. United States of America, western district of North Carolina. In the circuit court at Asheville. Central Trust Co. of New York, *et al.* against Richmond & Danville Railroad Co., *et al.* Amended petition of Marcus J. Goodson. W. S. Hyams, clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, FOURTH CIRCUIT, AT ASHEVILLE.

CENTRAL TRUST COMPANY OF NEW YORK ET AL.
vs.
RICHMOND AND DANVILLE RAILROAD COMPANY AND WEST POINT TERMINAL COMPANY.

JUDGMENT IN FAVOR OF MARCUS J. GOODSON, INTERVENOR, AGAINST SOUTHERN RAILWAY COMPANY.

This action having been brought on for trial at this term of the court, before his honor James E. Boyd, U. S. judge, and a jury, and having been tried and the jury having found the issues in favor of the plaintiff and against the defendant, and having assessed his damages at six hundred and fifty ($650) dollars,

It is now upon motion of John Gary Evans and Charles A. Moore, Esqrs., attorneys for Marcus J. Goodson, intervenor and petitioner, adjudged that he, the said Marcus J. Goodson, have and recover of the Southern Railway Company, said company having been made a party defendant herein and having answered the petition, the said Southern Railway Company being represented in this proceeding by W. A. Henderson, A. H. Price and Thomas S. Rollins, Esqrs., its attorneys of record herein, the sum of six hundred and fifty ($650) dollars, together with his costs in this behalf incurred to be taxed by the clerk of this court.

(Signed) JAS. E. BOYD,
U. S. Judge.

Filed in this office Nov. 18, 1903.
W. S. HYAMS, *Clerk.*

A true copy.
Test: W. S. HYAMS,
Clerk U. S. Circuit Court.

[Endorsed:] No. —. United States of America, western district of North Carolina. In the circuit court at Asheville. Central Trust Co. of New York *et al.* against Richmond & Danville Railroad *et al.* Judgment. W. S. Hyams, clerk.

Petitioner's cause of action by way of intervention, in the suit of Central Trust Company *vs.* Richmond & Danville Railroad Company.

Petition, amendment to the same, and judgment, in accordance with decree of foreclosure.

Cases decided by the supreme court of North Carolina, upon what is known as Last Clear Chance, Automatic Couplers, Assumption of Risk, Liability of Lessor, Presumption of Negligence, where servant injured, and injury to trespasser:

"Last Clear Chance."

Gunter *vs.* Wicker,	85,	p. 310.
Pickett *vs.* R. R.,	117,	616.
Fulp *vs.* R. R.,	120,	575.
Arrowood *vs.* R. R.,	126,	629.
Hood *vs.* R. R.,	129,	305.
Deens *vs.* R. R.,	107,	686.
Upton *vs.* R. R.,	128,	173.

"Automatic Couplers."

Greenlee *vs.* R. R.,	122,	p. 977.
Troxler *vs.* R. R.,	124,	189.
Hardin *vs.* R. R.,	129,	354.
Elmore *vs.* R. R.,	132,	865.

"Assumption of Risk."

Cogdell *vs.* R. R.,	129,	p. 398.
Coley *vs.* R. R.,	129,	407.
Thomas *vs.* R. R.,	129,	393.

"Liability of Lessor."

Logan *vs.* R. R.,	116,	p. 940.
Hardin *vs.* R. R.,	129,	354.

All cases reviewed in Hardin case, and doctrine reaffirmed.

"PRESUMPTION OF NEGLIGENCE."

Wright *vs.* R. R., 127, p. 222.
Marcon *vs.* R. R., 126, 200.
Kinney *vs.* R. R., 122, 964.

"INJURY TO TRESPASSER."

Pierce *vs.* R. R., 124, p. 63.
Perry *vs.* R. R., 128, 47.
Cook *vs.* R. R., 128, 333.

The foregoing are some of the cases referred to in the brief, showing, as we think, the strange doctrines, that have crept into the law of negligence, in North Carolina.